IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.		
	)	
	)	CRIMINAL NO. 04-201-A
SOLIMAN S. BIHEIRI,	)	
	)	The Hon. T.S. Ellis, III
a/k/a Soliman J. Biheiri	)	
Soliman S. Beheiri	)	**Hearing Date: December 10, 2004**
Soliman J. Beheiri	)	
Soliman Behairy,	)	
Solaiman Biheiri,	)	
	)	
Defendant	)	

GOVERNMENT'S POSITION WITH RESPECT TO SENTENCING FACTORS

The United States of America, by and through its undersigned counsel, hereby submits its position with respect to factors governing the sentencing of defendant Soliman Biheiri, in accordance with U.S.S.G. § 6A1.2 and the corresponding policy of this Court.

I. OFFENSES OF CONVICTION

On October 6, 2004, defendant pleaded guilty to the fraudulent procurement of a U.S. passport in violation of 18 U.S.C. § 1546. On October 12, 2004, defendant was found guilty by a jury of making false official statements in violation of 18 U.S.C. § 1001 when he told federal law enforcement agents in a June 15, 2003, interview that he did not have a business relationship with Mousa Abu Marzook, a designated foreign terrorist, and that he had never handled any money for, or on behalf of, Marzook. In fact, as the government's evidence at trial established,

Biheiri had extensive financial dealings with Marzook in the late 1980's and 1990's, managing approximately $1 million in investment funds on Marzook's behalf.

II. GOVERNMENT'S POSITION ON SENTENCING

Under U.S.S.G. § 2L2.2(a), the base offense level for a conviction under 18 U.S.C. § 1546 is 8. Under U.S.S.G. § 2B1.1(a), the base offense level for a conviction under 18 U.S.C. § 1001 is 6. In the absence of any upward adjustments, the government agrees with the Office of Probation that the combined offense level would be 10. The government also agrees that, in light of defendant's previous convictions under 18 U.S.C. §§ 1425(a) and 1015(a), the defendant's sentence would be assessed under Criminal History Category II.

As detailed below, however, the government respectfully submits that upward adjustments are appropriate with respect to defendant's conviction under 18 U.S.C. § 1001 pursuant to both U.S.S.G. § 3A1.4 (Terrorism) and in the alternative -- if the Court declines to impose an upward adjustment under U.S.S.G. § 3A1.4 – under U.S.S.G. § 5K2.9 (Criminal Purpose). The government submits that a separate upward adjustment is warranted under U.S.S.G. § 3C1.1 (Obstructing or Impeding the Administration of Justice) because defendant committed perjury during his testimony at trial.

In seeking these upward adjustments, the government's burden of proof is a preponderance of the evidence. *See United States v. Hammoud*, 381 F.3d 316, 355 (4th Cir. 2004) (upholding preponderance standard in application of terrorism enhancement under U.S.S.G. § 3A1.4); *United States v. Vinson*, 886 F.2d 740, ___ (4th Cir. 1989).[1]

[1] It should also be noted that at trial defendant expressly waived any rights he might have under *Blakely* to demand that his sentencing be determined by a jury. Defendant also agreed that the Court's determination of whether his sentence should be enhanced pursuant to U.S.S.G. § 3A1.4 should be governed by a preponderance of the evidence standard.

III. ENHANCEMENT FOR TERRORISM UNDER U.S.S.G. § 3A1.4

Section 3A1.4 states that "[i]f the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32." U.S.S.G. § 3A1.4(a). In such cases, "the defendant's criminal history category . . . shall be Category VI." *Id.* § 3A1.4(b). Application Note 2 of Section 3A1.4 states that a felony involved, or was intended to promote, a federal crime of terrorism if it "obstructed an investigation of a federal crime of terrorism." Application Note 1 of Section 3A1.4 states that "federal crime of terrorism" is defined at 18 U.S.C. § 2332b(g)(5).

At trial, Special Agent David Kane and Special Agent Mary Balberchak both gave unrebutted testimony that they interviewed defendant on June 15, 2003, as part of an investigation into whether certain organizations in Northern Virginia were engaged in financing terrorist organizations overseas, including HAMAS. Thus, they were conducting investigations into possible violations of material support for terrorists (18 U.S.C. § 2339A), material support for a foreign terrorist organization (18 U.S.C. § 2339B), and financing terrorism (18 U.S.C. § 2339C) – all offenses included within the definition of "federal crime of terrorism" set forth in 18 U.S.C. § 2332b(g)(5).[2]

Application Note 2 does not specify how obstruction is to be defined for purposes of Section 3A1.4, and the government is unaware of any precedent addressing this issue. In the

[2] Defendant was informed at the beginning of the interview that the agents were conducting a terrorism finance investigation. (See Government trial Exh. 25 (report of interview).)

absence of such authority, the most analogous guidepost for the Court is the obstruction of justice statute, 18 U.S.C. § 1503. Further, in the absence of contrary intent reflected in the text of Section 3A1.4 or Application Note 2, it would be odd to impose a more demanding obstruction standard on the government at sentencing than the government would confront if trying to establish criminal liability for obstruction in the first instance. It is also reasonable to believe that the Sentencing Commission intended for obstruction to be defined in a manner consistent with 18 U.S.C. § 1503 and its corresponding Sentencing Guideline, U.S.S.G. § 3C1.1.

In order to prove obstruction under 18 U.S.C. § 1503, the government need not demonstrate that justice was in fact obstructed, but must prove only that the defendant intended to obstruct justice.[3] *See United States v. Aguilar*, 515 U.S. 593, 599 (1995) ("This is not to say that the defendant's actions need be successful; an 'endeavor' suffices.") (citation omitted); *United States v. Church*, 2001 WL 585108, *2 (4th Cir. 2001) (citing *Aguilar*) (unpublished per curiam decision); *United States v. Filippi*, 1999 WL 89297, *4 (4th Cir. 1999) (per curiam unpublished decision); *United States v. Grubb*, 11 F.3d 426, 437 and n.19 (4th Cir. 1993) ("The

[3] Correspondingly, the weight of authority interpreting U.S.S.G. § 3C1.1 holds that the mere attempt to obstruct justice is sufficient to warrant the upward adjustment for obstruction. *See United States v. Hicks*, 948 F.2d 877, 886 (4th Cir. 1991) ("3C1.1 encompasses *attempts* to obstruct justice as well as actual obstruction") (emphasis in original); *United States v. Owens*, 308 F.3d 791, 794 (7th Cir. 2002) ("*actual* prejudice to the government resulting from the defendant's conduct is not required") (emphasis in original); *United States v. Stover*, 1998 WL 743593, *3 (4th Cir. 1998) ("The plain language of the guideline provides that attempts to obstruct justice are a basis for the adjustment.") (unpublished per curiam decision) (citing *United States v. Self*, 132 F.3d 1039, 1041 (4th Cir. 1997)); *United States v. Tillman*, 1998 WL 10118, *3 (4th Cir. 1998) ("Whatever the ultimate outcome might have been had he been successful, the attempt alone was enough to merit an adjustment for obstruction of justice.") (unpublished per curiam decision); *United States v. Francis*, 39 F.3d 803, 811 (7th Cir. 1994) ("actual prejudice to the government is not required for an obstruction enhancement because § 3C1.1 calls for an enhancement not only when the defendant has actually obstructed justice but also when the defendant 'attempted to obstruct or impede' the administration of justice").

operative wording of the statute is 'corruptly endeavor.' Such an endeavor need not be successful."). Thus, it is sufficient, for purposes of meeting its burden of proof under U.S.S.G. § 3A1.4, for the government to demonstrate that the defendant intended for his false statement about his past financial dealings with Marzook to obstruct the government's terrorist financing investigation in Northern Virginia.

Defendant had abundant incentive to obstruct the terrorism finance investigation being conducted by Agents Kane and Balberchak when he was interviewed at Dulles Airport. He knew that he had had extensive financial dealings with Marzook both before and after HAMAS had been designated as a foreign terrorist organization,[4] and before and after Marzook had been designated a foreign terrorist.[5] Those dealings were most conspicuously revealed at trial, *inter alia*, in the following exhibits admitted into evidence:

- Government Exh. 27 (signature card for Mostan bank account signed by Marzook as President of Mostan, and defendant as Vice President);

[4] HAMAS was designated as a terrorist organization in January 1995. (See Government trial Exhs. 12-13.)

[5] Marzook was designated as a terrorist in August 1995. (See Government trial Exh. 20.)

- Government Exh. 29A (February 4, 1991, $90,000 check issued to Marzook on Mostan's account);[6]
- Government Exhs. 30A-C (March 2, 1993, $90,000 wire transfer to foreign bank account of Marzook);[7]
- Government Exhs. 33A-B ($13,000 check dated May 7, 1996, issued to Mostan on the account of Combs Garden Limited Partnership);
- Exhibits 35A-C ($160,000 check issued to Mostan on the account of BMI Construction Fund, dated July 15, 1996, and another $160,000 check issued the same day to BMI-Marc on Mostan's account); and
- Government Exhs. 40B, 41B, 42B, 43B, 44B, 45B (status reports of Mostan investments with BMI from 1992 through 1997, showing initial Mostan investment of $1 million).

At the time that defendant was managing hundreds of thousands of dollars in investment funds on behalf of Marzook, it was widely known that Marzook was a senior HAMAS official. On November 30, 1993, for example, the Associated Press reported that "a leader of Hamas," identified as "Moussa Abu Marzouk," had met with Iran's foreign minister to discuss the Israeli-Palestinian conflict. (See Exh.1.) On April 19, 1994, the Associated Press published an item characterizing "Mousa Abu Marzouk" as "[a] leader of the Muslim militant Hamas movement." (See Exh. 2.)[8] After Marzook himself was designated a terrorist in August 1995, it became

[6] Government witness Gamal Ahmed testified at trial that he signed this check and caused it to be issued to Marzook at defendant's direction.

[7] Gamal Ahmed testified at trial that he sent this wire transfer to Marzook's account overseas at defendant's direction.

[8] There is substantial reason to believe that defendant was well aware of Marzouk's position with HAMAS. First, he testified at trial that he keeps abreast of both print media and news on the

illegal for defendant to deal in property in which Marzook had an interest under the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1701 *et seq*., and corresponding regulations of the Office of Foreign Asset Control, Department of the Treasury.[9] Thus, defendant had ample reason to fear that he would be criminally liable if he revealed his financial dealings with Marzook to Agents Kane and Balberchak.[10]

Moreover, it is reasonable to believe that defendant also lied to the agents about his financial dealings with Marzook to prevent them from uncovering evidence that might lead to the revelation and dismantlement of HAMAS's fundraising operations in the United States. The evidence supports a conclusion that defendant is a long-time supporter of HAMAS. Defendant's wife, Mahshid Fotoohi, told agents Kane and Balberchak in May 2003 that the Muslim Brotherhood, an extremist Islamist organization, regarded defendant as a person of "political brains."[11] (See Exh. 3.) Fotoohi also told agents that BMI rented office space on Route 7 in Virginia to Ismail Elbarasse and to an organization by the name of Islam Online, and that

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Internet. *United States v. Biheiri*, Oct. 8, 2004, Tr. at 22-23. In addition, defendant's wife told law enforcement agents that defendant and Marzook were in frequent telephone contact in the early and mid-1990s (see Exh. 3), that Biheiri called Marzook "Abu Omar" (*see id.*), and that Marzook visited the Biheiris' home in New Jersey. (See Exh. 4).

[9] The Court found in the first Biheiri case that "the government has established by more than a preponderance of the evidence that defendant violated the IEEPA through his dealings in Mostan funds after Marzook's SDT designation." *United States v. Biheiri*, 299 F. Supp.2d 590, 600 (E.D.N.Y. 2004) (Ellis, J.).

[10] In withholding information about his dealings with Marzook, Biheiri – a sophisticated financier with years of experience in banking – may have been counting on the possibility that the key bank documents tying Marzook to Mostan, by then more than ten years old, had been previously destroyed pursuant to standard bank procedures, and that government agents would be unable to obtain them.

[11] HAMAS itself was established by Palestinian members of the Muslim Brotherhood in 1987.

everyone who worked in the Islam Online office referred to Elbarrasse's office as the HAMAS office. (See Exh. 3.) Elbarasse and Marzouk operated a joint bank account at First American Bank in the early 1990s that both received large wire transfers from overseas and sent such transfers to overseas accounts. (See Exh. 5.) Elbarasse, long believed by federal law enforcement authorities to be a HAMAS operative, was arrested in August 2004 after being

observed by law enforcement agents videotaping the Chesapeake Bay Bridge from a vehicle. (See Exh. 6.)

An upward adjustment under Section 3A1.4 also is warranted if the Court requires the government to prove that defendant's materially false statements to Special Agents Kane and Balberchak about Marzook *actually* obstructed their terrorism investigation. First, a finding of actual obstruction is inherent in the jury's determination that defendant's false statement about his financial relationship with Marzook was material. Second, Special Agent Kane testified at trial that when he and Special Agent Balberchak interviewed defendant on June 15, 2003, Kane did not know about business dealings between defendant and Marzook, or about investments in BMI or its associated businesses by or through Marzook. This absence of knowledge is evident in the agents' report of their interview with defendant (Government trial Exh. 25), which contains no indication that any questions were asked about Mostan. Had the agents known and understood the facts about defendant's financial dealings with Marzook, they would have asked him detailed questions about that subject during the interview at Dulles Airport.

Special Agent Kane testified that when he first saw Mostan bank records during a trip to Chicago in late June 2003 (after the interview with defendant), he regarded the discovery as very

significant, prompting him to query the Treasury Enforcement Communications System (TECS) database for information regarding Marzook and Mostan. Agent Kane testified that he would have queried the TECS database prior to going to Chicago if defendant had told the truth during the June 15, 2003, about his financial dealings with Marzook.

Third, it was not until a few weeks after the June 15, 2003, interview with Biheiri that agents were able to gain access to defendant's personal laptop computer and find, for the first time, a computer sub-directory named "Mostan"under the parent directory "Biheiri" (as Special Agent Robert Connelly testified), containing numerous reports of Mostan's investments with BMI and its related companies.[12] No U.S. Government agency or official had previously seen these documents, and they revealed substantially greater details about Marzook's investments with defendant – investments which the government had reason for concern were for the benefit of HAMAS.

Fourth, defendant's denial of any financial dealings with Marzook prevented Agents Kane and Balberchak from learning about the underlying financial relationship between Marzook and defendant's company BMI, thereby further hindering their investigation of how funds were being raised in the United States for HAMAS. On or about August 21, 2004, federal agents searched the Annandale, Virginia, residence of Ismail Elbarasse pursuant to a warrant issued by this Court. Among the documents discovered at Elbarasse's home were the following:

[12] See Government trial Exhs. 40B. 41B, 43B, 44B, and 45B.

1. A September 1, 1988, written agreement between Marzook and BMI, signed by defendant and Marzook, providing for Marzook to earn "10% of the net profit distributed by B.M.I. at the end of the year as a result of the investment of funds contributed by the person or persons introduced directly by [Marzook]," plus "10% of the net profits generated by B.M.I. from funds provided by other parties who are introduced to B.M.I. indirectly (through investors introduced by [Marzook]." (See Exh. 7.)[13]

2. A 1988 federal tax return for Mostan identifying Marzook as the President and sole shareholder of the company (see Exh. 8);
3. Bank records showing that Marzook and Elbarasse maintained a joint bank account at First American Bank in the early 1990s, that large sums of money were wired into that account from overseas, and that large sums of money were wired out of that account to overseas accounts. (See Exh.5.)
4. A fax transmission on BMI Inc. stationery dated October 25, 1989, from Dr. Hussein Ibrahim to "Mousa Abu Marzouk (Abu Omar), containing the direction to "[p]lease deliver these papers to brother Abu Omar expeditiously," and a handwritten letter on BMI Inc. stationery from Ibrahim to "Abu Omar" stating the following: "I pray to God that you and all the family and the brethren are doing alright. I am sending you via the mail the complete study for the Maryland project. . . . May God reward you with goodness for your blessed

[13] The Arabic-language documents included herein as exhibits were translated by Marlene Burke, an Egyptian-born Intelligence Research Specialist employed by Immigration and Customs Enforcement, U.S. Department of Homeland Security.

movement and I pray to God that he makes us successful in managing this work." (Exh. 9.)

5. A November 17, 1989, handwritten letter from Hussein Ibrahim to "Kind brother/Abu Al Hassan" that includes the following:

- "A financial investment company was founded by the name of Mostan. The amount of 700,000 dollars was deposited in it on 1/8/88 (August 1988."
- "Attached is a copy of the latest bank statement. You will find the name and address of the bank, and the bank account as well as the last amount that Abu Omar transferred (You have up till now $800,000 with BMI)."
- The original amount was invested at the beginning of this year (January/February) in the Maryland Project."
- "The project has accumulated the amount of $1,370,000, including the amount of $200,000 which Abu Omar will transfer at the beginning of December 1989."
- A handwritten diagram showing $ 1 million in funds from Mostan going through BMI into the New Delta project, and showing BMI as the Managing Partner for that project. (Exh. 10)

6. A December 8, 1989, letter on BMI Inc. stationery from Dr. Hussein Ibrahim to "MOSTAN [handwritten] Abu Omar" regarding the "Marlow Heights Project." (Exh. 11.)

7. December 28, 1990, fax transmission on BMI Inc. stationery from Hussein Ibrahim to Mousa Abu Marzouk that included the following:

- A handwritten letter from Hussein Ibrahim to "Kind Brother/Abu Omar" referencing enclosures that include "Fourth work progress report on the Delta company and its real estate project in Washington" and "Financial Summary of the project's achievements

regarding the first phase of the Mostan Company, which is near completion."

- A handwritten table captioned "Mostan Profits for the First Phase." (Exh. 12.)

If defendant had been truthful with the agents about his past financial dealings with Marzook, the government would have learned sooner about Marzook's infusion of money into BMI through Mostan, as reflected in the above-referenced documents found in the August 2004 search of Elbarrasse's residence, a determination that would have been significant in the government's investigation of fundraising for HAMAS.

There is recent precedent for applying the upward adjustment required by Section 3A1.4 for obstruction of an investigation of a federal crime of terrorism, where, as in this case, the underlying conviction was for making false official statements under 18 U.S.C. § 1001. In the recent case of *United States v. Maflahi*, the defendant was convicted by a jury of making false official statements to FBI agents about his support for terrorism. *United States v. Maflahi*,[14] No. 03 CR 412, Transcript of Sentencing at 5, 7-8 (E.D.N.Y. July 9, 2004).[15] Relying upon Application Note 2 of U.S.S.G. § 3A1.4, the government sought the maximum statutory sentence of five years on the grounds that Maflahi had obstructed an investigation of material support for a designated foreign terrorist investigation. At the sentencing hearing, government counsel stated that

> the evidence was quite clear that Mr. Mafhani's [sic] lies to the agents about the fund-raising activity of the Sheik [Abdul] Satar directly impacted and obstructed the agents' investigations into Satar's fund-raising activities, and the possibility that those monies were going directly to Al Qaeda. as well as their investigation into Al-Moayad and his support of Al Qaeda and Hamas. The evidence was clear on that. Agent Murphy

[14] In the transcript of the sentencing proceeding, the defendant's last name is incorrectly spelled "Mafhani."

[15] A complete transcript of the sentencing in the *Maflahi* case is attached hereto as Exh. 13.

> testified as to what was being investigated at the time that Mr. Mafhani lied to him. In addition to that, the agents, when interviewing Mr. Mafhani, expressly advised him that they were investigating whether or not Satar, during that fund-raising trip, was financing terrorism. The investigation Agent Murphy was conducting was in the terrorist financing of the Al-Moayad and the possible terrorist activity by Sheik Satar. The defendant's lies with respect to his activity with Sheik Satar clearly impacted that investigation, and as such, he clearly obstructed a federal investigation of terrorism based on the Application Note 2 of 3A1.4. [T]he terrorism enhancement clearly applies in this case . . . .

Id. at 12, 14.

The court in *Maflahi* agreed that Application Note 2 applied, finding that "it is appropriate under the Guidelines to enhance [the defendant's offense level] by twenty-six levels, and also to treat the defendant as criminal history category 6 under . . . 3A1.4." *Id*. at 15. The court explained that "it is undisputed in this case that what the government authorities were investigating was a federal crime of terrorism, and certainly the trial established that. . . . The proof here is overwhelming that the defendant knew he was lying about facts relevant to an investigation of a federal crime of terrorism." *Id*. at 16-18. Ultimately, the court concluded that the terrorism enhancement could not constitutionally be applied under *Blakely*. Id at 19. In the alternative, however, the Court still sentenced Maflahi to five years of imprisonment, reiterating that "the defendant knew that the investigation as to which he was willfully lying to the FBI related to terrorism and specifically the financing of terrorism." *Id*. at 20-21.

As in *Maflahi*, there is no question that Agents Kane and Balberchak were conducting an investigation of a federal crime of terrorism when they interviewed defendant at Dulles Airport on June 15, 2003. Nor is there any doubt that defendant knew he was lying to the agents about his past financial dealings with Marzook, as the jury concluded. It is also clear that defendant's denial of any financial relationship with Marzook precluded Agents Kane and Balberchak from learning the details about the connection between Marzook, Mostan, and BMI until they returned

to Chicago later in June, reviewed documents contained on defendant's computer several weeks later, and discovered Mostan and Marzook-related documents at Elbarasse's residence in August 2004.

For obstructing the government's investigation of federal crimes of terrorism, defendant deserves a sentence that is fully consistent with the seriousness of his conduct. Because increasing defendant's offense level by 12 levels would result in an offense level below 32, the Court therefore should increase his level by 26 levels to reach level 32, as provided by U.S.S.G. §3A1.4. The appropriate sentence would therefore be 60 months, the statutory maximum for a violation of 18 U.S.C. § 1001.

IV. UPWARD DEPARTURE FOR CONCEALMENT OF OTHER OFFENSE UNDER U.S.S.G. § 5K2.9

Section 5K2.9 of the Sentencing Guidelines authorizes an upward departure "[i]f the defendant committed the offense in order to facilitate or conceal the commission of another offense . . . ." U.S.S.G. § 5K2.9. "Where that factor is present," the Fourth Circuit has observed, "'the court may increase the sentence above the guideline range to reflect the actual seriousness of the defendant's conduct.'" *United States v. Davis*, 380 F.3d 183, 189 (4th Cir. 2004) (quoting U.S.S.G. § 5K2.9). Accordingly, "section 5K2.9 clearly is an 'encouraged' basis for departure" for purposes of the departure standards set forth by the Supreme Court in *Koon v. United States*, 518 U.S. 81 (1996). Davis, 380 F.3d at 189 (citing United States v. Barber, 119 F.3d 276, 280 (4th Cir. 1997) (en banc).

Here, defendant concealed from Agents Kane and Balberchak his commission of multiple violations of IEEPA by denying having had any financial transactions with Marzook. In so doing, he denied having dealt in property in which a designated terrorist had an interest, which

IEEPA prohibits. Although U.S.S.G. § 2B1.1(c)(3) cross-references 18 U.S.C. § 1001 - the offense of conviction here – it does not address the issue of concealing the commission of another offense. Therefore, the "encouraged factor" is not accounted for in the applicable guideline. *See Davis*, 380 F.3d at 189-90. Even if, *arguendo*, U.S.S.G. 2B1.1(c)(3) generally accounts for the encouraged factor of section 5K2.9, a departure under section 5K2.9 would be warranted because defendant's concealment of his financial dealings with a designated HAMAS terrorist for whom he managed approximately $ 1 million is "'of such an exceptional or extraordinary degree that it is outside the heartland of situations encompassed within the applicable guideline.'" *Davis*, 380 F.3d at 190 (quoting *Barber*, 119 F.3d at 280).

For all these reasons, the Court should therefore sentence defendant above the guideline range if it concludes that upward adjustment is not warranted under U.S.S.G. § 3A1.4.

V. UPWARD DEPARTURE FOR OBSTRUCTION OF JUSTICE UNDER U.S.S.G. § 3C1.1

Defendant also should receive an upward adjustment of two levels under U.S.S.G. § 3C1.1 for committing perjury during his trial testimony. Section 3C1.1 provides for a two-level enhancement of a defendant's base offense level where "(A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction . . . ; or (ii) a closely related offense." U.S.S.G. § 3C1.1. It is well established that perjury may be the basis for an obstruction of justice enhancement under Section 3C1.1. *See United States v. Dunnigan*, 507 U.S. 87, 94-95 (1993); *Hammoud*, 381 F.3d at 357; *see also* U.S.S.G. § 3C1.1 comment 4(b).

For the Court to apply the sentencing enhancement for obstruction based upon defendant's

perjury, it must find that the defendant, while testifying under oath, (1) gave false testimony; (2) concerning a material matter; (3) with the willful intent to deceive (rather than as a result of confusion, mistake, or faulty memory). *See Hammoud* (citing *United States v. Quinn*, 359 F.3d 666, 681 (4th Cir. 2004)).

At trial, defendant attempted to establish that his false statement to federal agents regarding his past financial dealings with Marzook was not material because, he claimed, he had previously supplied the government with documents reflecting the relationship between BMI, defendant's company, and Mostan, the financial entity through which Marzook brought money into BMI. On direct examination, defendant testified that he received a subpoena from the FBI office in Chicago requiring the production of files relating to BMI. Tr. at 23 (Oct. 8, 2004). He also testified that, upon consultation with attorney at the time, he sent documents to the FBI office in Chicago "[f]or every single corporation we ever . . . established, for every limited partnership, for every bank statement of any bank account we ever opened in Bank of New York," including records concerning Mostan. *Id*. at 25. On cross-examination, defendant remained adamant that he had sent copies of records to the FBI office in Chicago containing information about the connection between Marzook and Mostan. *Id*. at 67-68.

Defendant's testimony was perjurious. First, his testimony was false. The only subpoena for records that the FBI field office in Chicago sent to BMI was a subpoena issued on or about January 23, 1997, for certain records of Kadi International Corporation. (See Exh. 14.) In response to this subpoena, Gamal Ahmed, BMI's office manager, sent a letter on BMI letterhead to the U.S. Attorney's Office in Chicago on or about February 12, 1997, advising that Kadi International had no records responsive to the subpoena. On or about June 12, 1997, defendant

sent a Fedex package to the U.S. Attorney's Office in Chicago containing financial documents relating only to Kadi International. (See Exh. 15.) On or about June 25, 1997, defendant's attorney, Alfred Maurice, sent a package by UPS Worldwide Express to FBI Special Agent Shawn Wolff in Chicago, consisting of additional documents relating to Kadi International. (See Exh. 16.) Neither defendant's Fedex mailing on June 12, 1997, nor his attorney's UPS mailing on June 25, 1997, contained any documents mentioning Mostan or Marzook. Indeed, in a telephone conversation, Maurice advised that he had never heard of Mostan and had no recollection of a subpoena requiring the production of Mostan records.

Second, defendant's false testimony was material. A matter is material for the purposes of perjury if, "believed, [it] would tend to influence or affect the issue under determination," U.S.S.G. § 3C1.1 comment n.6, or could "substantially affect the outcome of the case." *United States v. Hilliard*, 31 F.3d 1509, 1518-19 (10th Cir. 1994); *see Dunnigan*, 507 U.S. at 95. Here, the issue of whether Biheiri had provided materials concerning Mostan and Marzook clearly was material because it directly concerned the materiality element of the false statement charge against defendant. Specifically, defendant's position as to why his false statement regarding Marzook was not material was that he already had provided materials to the FBI in Chicago revealing the connection between Marzook and Mostan. Hence, defendant tried to persuade the jury, the terrorist finance investigation being conducted by federal agents who interviewed him at Dulles Airport could not have been prejudiced by his false statement.

Third, there is no basis to believe that defendant's false testimony at trial was a result of confusion, mistake, or faulty memory. Defendant was emphatic on both direct and cross-

examination in claiming that he (or his attorney) sent records of Mostan to U.S. Government officials in Chicago. Moreover, there is no evidence that BMI or anyone acting on BMI's behalf *ever* sent *any* records revealing any connection between Mostan and Marzook to U.S. Government officials in Chicago or anywhere else. To the contrary, the U.S. Attorney's Office in Chicago obtained financial records of Mostan – including the account signature card containing Marzook's name and signature[16] – by means of a subpoena issued to the Bank of New York, not to BMI. (See Exh. 14.) The Bank of New York, following a review of its records, has advised that its records "[do] not contain any customer notification letters or any documents indicating that the existence of the subpoenas was disclosed in any way to Soliman Biheiri, Mostan, BMI, Inc., or persons acting on behalf of Mr. Biheiri, BMI, or Mostan." (Exh. 17.)[17] The U.S. Attorney's Office for the Northern District of Illinois (Chicago) has advised that it has no records of having issued a subpoena for documents to BMI concerning Mostan. Defendant simply invented the story that he had sent Mostan-related documents to Chicago to deceive the jury and avoid conviction.

Finally, the jury already rejected defendant's version of events when it found that his false statements about his past financial dealings with Marzook were material. Defendant should not be permitted to breathe new life into his fabrications in the penalty phase of this matter.

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[16] This document (Government Trial Exh. 27), more than anything else, revealed the connection between Mostan and Marzook to Agents Kane and Balberchak because Marzook's name and signature appear on it in his capacity as "President" of Mostan.

[17] Contrary to defendant's claim that he received an invoice for the cost of copying bank records, the Bank of New York also advised that its "files also do not contain any records indicating that the Bank of New York sent a bill to any individual or entity regarding the production of records relating to Mostan. In that regard, it is important to note that the Bank of New York – both at the time it complied with these subpoenas and currently – does not charge

Respectfully submitted,

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or copying or mailing records relating to a corporate entity such as Mostan." (See Exh. 17.)